IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRIMINAL MISC.NOs.7519 & 9934 M OF 2006

DATE OF DECISION: MAY 07, 2007

Zeenat Mallik

.....Petitioner

VERSUS

Union of India and others.

....Respondents

CORAM:- HON'BLE MR.JUSTICE RANJIT SINGH

1. **Whether Reporters of local papers may be allowed to see the judgement?**
2. **To be referred to the Reporters or not?**
3. **Whether the judgment should be reported in the Digest?**

PRESENT: Mr. Hemant Saini, Advocate,
for the petitioner.

Mr. Aman Lekhi, Sr.Advocate with
Mr. P.I.P.Singh & Mr.A.K.Jain, Advocates,
for respondent Nos.5 to 8.

*****

RANJIT SINGH, J.

Well placed and educated couple is unable to adjust and are fighting with full vigour. Petitioner, Zeenat Mallik was married to respondent No.5, Biraja Prasad Mallik, who is serving in Indian Foreign Service. Soon after the marriage, differences arose between them, leading to separation and filing of FIR by petitioner against her husband and other family members. She has now filed Criminal Miscellaneous Petition No.7519 M of 2006 under Section 482 Cr.P.C. for transfer of investigation in FIR No.7 dated 8.2.2005 registered under Sections 498A, 406 IPC to Central Bureau of Investigation or any other independent agency. Another Criminal Miscellaneous Petition No.9934 M of

2006 is filed for cancellation of bail granted to respondent Nos.5 to 7, who are husband, father-in-law and mother-in-law of the petitioner. Both the petitions are heard together and are being disposed of by this common order.

The facts, in brief, to get the hang of the issues agitated in both the petitions are that the petitioner married respondent No.5 on 30.6.2001. Allegedly, a sum of Rs.30 lacs was spent on wedding, for which father of the petitioner had to sell his prime land measuring 20 Kanals 7 Marlas. No sooner had the petitioner joined her husband (respondent No.5) at Indian Embassy, Moscow, routine of torture, beating and demand of dowry commenced. The petitioner returned to India in January 2002, when demand of dowry, including demand of a flat at Delhi, was made. In February 2002, the petitioner allegedly joined her husband at Moscow but noticed that nothing had changed. She complains that she was severely beaten and her ear rings were ripped, leading to excessive bleeding from the lobes of the ears. Unable to bear this torture, the petitioner wrote a letter to Indian Ambassador at Moscow. An emergency ticket was arranged for the petitioner and she returned to India on 25.6.2002, whereafter she is residing at Pathankot with her parents. When respondent No.5 failed to take initiative for negotiating and for resolving the differences, the petitioner ultimately filed a complaint under Sections 406, 498A IPC in November 2003. Instead of registering an FIR, the police held investigations and registered FIR only on 8.2.2005. Superintendent of Police, Headquarters, gave his report after investigation, which clearly indicated that demand of dowry stood proved and so did the handing over of the dowry as per the list given

by the parents of the petitioner. The grievance is that still the FIR was registered only against the husband and that too under Sections 406, 498A IPC. Serious grouse is also made against the manner of conducting the investigation. In this regard, it is pointed out that no efforts were made to recover the dowry articles and still a statement was made on behalf of the police before the Sessions Judge to the effect that the dowry articles have been recovered and that the police would have no objection if anticipatory bail is granted to the accused. It is otherwise not disputed that Zen car was recovered. Because of this unfair approach of the police, mainly due to the position held by respondent No.5, prayer is made for transfer of this investigation to some independent agency like C.B.I. etc.

The main emphasis in the petitions as well as during the course of arguments on behalf of the petitioner was that no recovery of dowry articles was made but still the statement was recorded before the Sessions Court, saying that dowry has been recovered. This, as per counsel for the petitioner, would amount to mis-statement aimed at to secure the concession of anticipatory bail from the Court and, thus, this fact is enough to cancel the anticipatory bail granted to the private respondents.

The prayers made in both the petitions have been vehemently opposed on behalf of the respondents. The allegation of demand or receipt of dowry, as such, is denied. As per the respondents, no case for cancellation of bail or transfer of investigation, as pleaded, is made out. Opposing the prayer for cancellation of bail granted to respondent Nos.5 to 7, the counsel submits that different considerations would arise for grant of and

cancellation of bail once granted. In this regard, the counsel placed strong reliance on the case of ***Dolat Ram Vs. State of Haryana,*** (1995) 1 SCC 349. Counsel for respondent No.5 would say that recovery or non-recovery of dowry articles can not have any relevancy for grant or denial of bail. In this regard, he refers to the observations of the Hon'ble Supreme Court in Para 10 of the judgement in the case of ***Samarendra Nath Bhattacharjee Vs. State of W.B. And another,*** (2004) 11 Supreme Court Cases 165. It is pointed out that the counsel for the respondent-complainant appearing in the said case had supported the order of the High Court, cancelling the bail by contending that bail ought not to have been granted by the trial Court because there were recoveries yet to be made from the appellant in the said case. The Hon'ble Supreme Court in the case of Samarendra Nath Bhattacharjee (supra) held that High Court erred in cancelling the bail granted to the appellant. From this, the counsel sought to contend that recovery of dowry articles cannot be said to be a valid consideration for cancellation of bail.

While opposing the prayer of the petitioner for transfer of investigation, the counsel says that no basis are laid in the petition to substantiate the allegation of mala fide, which, as per him, appears to be the main plank of the prayer. He would also say that if the petitioner was to seek transfer of investigation on account of mala fide of any Investigating Officer, he was necessarily required to implead him as a respondent and his response obtained. That having not been done, the petitioner cannot be heard on the allegation of mala fides. The counsel would further submit that even if

the plea is that investigation is not being conducted in a bonafide manner, then also it can not lead to an allegation of mala fides or proof thereof. Counsel would rely on the case of ***State of Bihar and another Vs. P.P.Sharma, IAS and another,*** 1992 Supp (1) Supreme Court Cases 222 in this regard. It is also submitted that FIR in this case was registered in the year 2005 and the present move now has been made, when the cancellation report is filed before the Court. Contention is that if there was any mala fide on the part of the Investigating Officer, the same was bound to be raised and pointed out at the initial stage of investigation and the petitioner could not be expected to wait till the time of filing of cancellation report to raise the plea of mala fides against the investing agency. In this context, the counsel would further submit that the petitioner even has an alternative remedy to seek further investigation into the case by making such an application either by contesting cancellation report or by moving an appropriate application in this regard before the trial Court. As per the counsel, this indeed has happened as the trial Court, on the basis of a statement made by the petitioner, has sent the case back for re-investigation to the police concerned and in this regard has placed before the Court an order dated 8.1.2007, which reads as under:-

> "Statement of the complainant recorded, wherein she has stated that she dis-agreeing with the cancellation report. Under these circumstances, same is sent back for re-investigation to the Police Station concerned. Order sheets of this court be separated, whereas copy of the order be placed with the cancellation report."

Mr.Saini, appearing for the petitioner, however, would join issue with the counsel for the respondents in this regard and says that the petitioner has no alternative remedy for seeking investigation by some independent agency. As per him, the trial Court indeed may have power to order further investigation but it can so order for the same police against whom the petitioner has a grievance. The trial Court, as per him, would have no power to direct investigation by some independent agency, as can be the scope of Section 482 Cr.P.C. Though some submissions were made by the counsel for the private respondents with regard to the power of this Court to order investigation by independent agency while exercising inherent powers under Section 482 Cr.P.C. to say that more appropriate remedy for such a prayer would be under Article 226 of the Constitution of India but he did not pursue this seriously.

The word **"mala fide"** has been well explained by the Hon'ble Supreme Court in the case of P.P.Sharma (supra) to means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. No doubt any administrative authority has to act in a proper manner and not with any motive or ulterior purpose contrary to the requirement of statute. But if the administrative act is done in a good faith and honestly, then whether it is done negligently or not is immaterial. As per the Supreme Court, the determination of plea of mala fide involves two questions, namely, (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power. To prove mala fide, mere assertion or a vague or bald statement is not sufficient. It

has to be demonstrated either by the admitted or proved facts and the circumstances available in a given case. Only if it is established that the action has been taken mala fide for some considerations or by way of fraud on power or colourable exercise of power, it cannot be allowed to stand.

Though much submissions were made on behalf of the respondents that neither any mala fides are proved from the record nor these can be gone into as no one has been impleaded in person, yet I am of the view that this fact need not detain me any further. The prime submission made by counsel for the petitioner for cancellation of bail and for transfer of the investigation is that the present police officials investigating the case had made a mis-statement before the Court to the effect that dowry articles were recovered, which indeed was not a fact. So the primary plank of attack of the petitioner for cancellation of bail as well as for transfer of investigation is the mis-statement made by the investigating agency. The counsel would further supplement his submission by saying that no dowry articles are recovered in this case and as such, the bail, which was granted to respondent Nos.5 to 7on that consideration, needs to be cancelled. Both the counsel had made mention to the facts in detail and had referred to certain letters written by respondent No.6, yet I am not going into the factual aspect of the issue as it is not considered appropriate. In fact, in the case of P.P.Sharma (supra), the Hon'ble Supreme Court clearly observed that rival contentions made by the parties based on the respective appreciation of material on record are not required to be gone into to express any opinion thereon and the Court found that the High Court had fallen into error

in appreciating the documents produced before it and had delved into disputed questions of facts while exercising jurisdiction under Articles 226/227 of the Constitution of India.

Taking up the prayer of the petitioner for cancellation of bail, it is not a matter of dispute that consideration for grant of bail and that for cancellation are entirely different. The guiding observations made by Hon'ble Supreme Court in Dolat Ram's case (supra) would need a reference in this regard:-

> "Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the

distinction of the factors relevant for rejecting bail in a non-bailable case in the first instance and the cancellation of bail already granted."

As noticed by the Hon'ble Supreme Court, principle for cancellation of bail generally is due to supervening circumstances and if these have rendered no longer conducive to a fair trial to allow the accused to retain his freedom then the concession granted to him may be cancelled. As noticed by the Hon'ble Supreme Court in various cases, the considerations, which normally weigh with the court while granting bail in non-bailable offences generally are **`nature and seriousness of the offence', `nature of the evidence', `circumstances peculiar to the accused', `possibility of his presence/absence', 'apprehension of tampering with the evidence'** etc. On the other hand, for cancellation of bail, entirely different considerations would arise and these generally would not require examination of merits of the order, granting bail. Normally, relevant consideration in this regard is to see if the accused granted bail has attempted to tamper with the evidence subsequent to his release or has advanced any threat to the witnesses or is in any manner acting to delay the trial or has evaded the Court or perhaps has committed any offence, leading to some serious law and order problem. Cancellation of bail, as observed by the Hon'ble Supreme Court in the case of ***State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and others,*** (2003) 8 Supreme Court Cases 50 is only in exceptional cases where the order granting bail is vitiated by any serious infirmity and in the interest of justice, it become necessary to

interfere with the discretion exercised in granting bail that the order would be interfered with on merits. Applying the above consideration to this case, it can be said that the main ground of attack for cancellation of bail of respondent Nos.5 to 7 is the mis-statement allegedly made before the Sessions Court. Concededly, said mis-statement was not made by the private respondents. It is only the police who had stated before the Court that some articles, including car, were already recovered from the accused and, thus, they are not required by the police for custodial interrogation. Admittedly, the car has been recovered. It was made out by the police before the Court that respondent Nos.5 to 7 are not needed for custodial interrogation. No submission is made before me in regard to the need of custodial interrogation of private respondent Nos.5 to 7. The transfer of investigation in this case is sought mainly on the ground that the police has not acted fairly to investigate the case, as is reflected from the conduct of the police. It is made out that respondent No.5 is a senior I.F.S. Officer and as such, police has not been in a position to conduct fair and independent investigation. In a way, the allegation of mala fide or lack of bonafide is made. This general allegation is made against the police. It cannot be disputed that the petitioner did not raise any such allegation during the course of investigation and did so only when the police has filed a cancellation report. Counsel for the private respondents would be justified in making a grievance that the petitioner waited for the outcome of the investigation to make such an allegation. As per the counsel, if she was genuinely aggrieved against the manner of investigation being not fair, she was bound to raise objection at the initial stage. Rather, respondent

Nos.5 to 7 would raise a grievance that Superintendent of Police, conducting the investigation, was unfair to them, who made certain observations in his report, which are uncalled for. Once the police has fairly come to a conclusion that no case of demand of dowry etc. is made out, they have submitted a fair report before the Court. Counsel for the petitioner could not say anything else except stating that the investigation need to be transferred because the police did not recover the dowry articles. That ground alone, in my view, would not be sufficient to hold that the police is not acted in a fair manner or that the investigation is tainted in any manner on that ground. Counsel for private respondents would also say that this FIR could not have been registered at Pathankot as no cause of action appears to have been arisen there. He would accordingly express his grievance that the police was rendering help to the petitioner by first registering a case at Pathankot and then conducting investigation in the same. In this regard, he would also refer to the case of ***Y.Abraham Ajith and Ors. Vs. Inspector of Police, Chennai and anr.***, AIR 2004 Supreme Court 4286. In this case, the Supreme Court held that where harassment to wife by husband at a place `N' on account of dowry is there and wife came to live at Chennai and thereafter not even a whisper of allegations about any demand of dowry, then in a complaint under Sections 498A, 406 IPC and Section 4 of the Dowry Prohibition Act, the Court at Chennai would have no jurisdiction to entertain such a complaint. I am not going into this aspect as the plea of jurisdiction does not arise before me directly.

It is also argued before this Court that the petitioner had

earlier filed Criminal Misc. Petition No.23645 M of 2005, seeking direction for registering a case against other family members of the husband-respondent, which was dismissed by this Court on 2.5.2005. He submits that the petitioner was fairly expected to disclose this fact. On the other hand, it is contested by counsel for the petitioner, who says, this petition has nothing common with the relief claimed in the present petition and accordingly, would have no relevance for deciding the present petitions.

The nature and functions of the police officers in investigating the offence have been referred to by various Courts in number of cases. In ***Union of India & Ors. Vs. Sushil Kumar Modi & Ors.***, JT 1997 (1) S.C. 679 (known as `Bihar Fodder Scam case), the Hon'ble Supreme Court gave out the purpose of such proceedings. In this case, it is held that “it has to be borne in mind that the purpose of these proceedings is essentially to ensure performance of the statutory duty by the CBI and the other government agencies in accordance with law for the proper implementation of the rule of law. To achieve this object a fair, honest and expeditious investigation into every reasonable accusation against each and every person reasonably suspected of involvement in the alleged offences has to be made strictly in accordance with law. The duty of the Court in such proceedings is, therefore, to ensure that the CBI and other government agencies do their duty and do so strictly in conformity with law. In these proceedings, the Court is not required to go into the merits of the accusation or even to express any opinion thereon, which is a matter for consideration by the competent court in which the charge-sheet is filed and the

accused have to face trial. It is, therefore, necessary that not even an observation relating to the merits of the accusation is made by the Court in these proceedings lest it prejudice the accused at the trial. The nature of these proceedings may be described as that of "continuing mandamus" to require performance of its duty by the CBI and the other government agencies concerned."

Thus, this Court, while exercising jurisdiction in such like cases, is only required to ensure that the Government agencies do their duties in conformity with law. This Court is not required to go into the merits of the accusation or to express otherwise any opinion thereon. Seen in this context of the law laid down by the Hon'ble Supreme Court, interference is only called for if the Court finds that any Government agency has not performed its duty in conformity with law and has not conducted object, fair and honest investigation. No such grievance is made in the petition. It is only stated that the investigation may be transferred to some independent agency, as no recovery of the dowry articles has been effected. This fact alone would not reveal that the police has not conducted fair, just and proper investigation, which may call for any interference. Accordingly, in my view, sufficient basis have not been made by the petitioner, which may call for interference to order investigation by some independent agency like C.B.I.

In view of the detailed discussion above, both the petitions are dismissed.

May 07, 2007 **(RANJIT SINGH)**
khurmi **JUDGE**